Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1818

BEACON NATIONAL INSURANCE COMPANY and FIRST PREFERRED INSURANCE COMPANY,
Petitioners

v.

TEXAS STATE BOARD OF INSURANCE and TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION,
Respondents

BRIEF OF TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION IN OPPOSITION TO PETITION FOR CERTIORARI

CLARK, THOMAS, WINTERS
& SHAPIRO
MARY JOE CARROLL
P. O. Box 1148
Austin, Texas 78767
(512) 472-8442
Attorneys for Respondent
Texas Catastrophe Property
Insurance Association

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

The parties in this cause are:

Beacon Insurance Company, and
First Preferred Insurance Company, Petitioners

v.

Texas State Board of Insurance, and
Texas Catastrophe Property Insurance
Association, Respondents

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The petition for certiorari should be denied because no federal question of substance was decided below.

OPINIONS BELOW

The only mention of any federal question in either opinion below is the introductory paragraph in the trial court order reading (Petition, Appendix 7, p. 37):

> "By pretrial order previously entered in this cause, the Court held that Plaintiffs' petition stated two separate and divisible causes of action, one being an administrative appeal under Article 21.49 of the Texas Insurance Code, Article 1.04f of the Texas Insurance Code, and Article 6252-13a, V.A.T.S., and the other a suit to determine questions as to the constitutionality of the statute. The Court has also previously held that the administrative appeal portion of the suit is controlled by the Texas Register and Administrative Procedure Act, Article 6252-13a V.A.T.S. and subject to review under the Substantial Evidence Rule. The Court then severed the administrative appeal and the administrative appeal was submitted to the Court upon the basis of the record before the State Board of Insurance and the briefs of the parties; and the Court having considered all material pertinent to that portion of the case and finding that the Order entered herein by the State Board of Insurance was not arbitrary, capricious or unreasonable but is instead reasonably supported by substantial evidence;"

Actually there were two pretrial orders. A copy of the first is attached hereto as Appendix A; the second is included as Appendix B. In conformity with the second order, the courts below limited their holdings to Texas law and Texas procedure.

JURISDICTION

The final state court judgment was not based upon any treaty or statute of the United States and does not rule upon the validity of any state statute; Petitioners concede that "the decision below was not based on federal grounds" (Petition, p. 8); the requirements of 28 U.S.C. § 1257(3) have not been fulfilled.

QUESTIONS PRESENTED

The questions asserted by Petitioners are not properly based on the judgments below. As the trial court made abundantly clear in the portion of the opinion quoted hereinabove, the administrative appeal was severed from the portion of the originally asserted cause of action wherein Petitioners alleged violation of constitutional rights and guarantees. The administrative appeal was separately tried and, after trial, severed for separate appeal. The order of severance was prompted by Petitioners' motion which is attached hereto as Appendix C, and the order itself is attached hereto as Appendix D. The judgment and rulings below (Petition Appendix 1, 2 and 7) relate solely to the administrative appeal. The constitutional allegations in Petitioners' pleadings were later separately tried, but the holdings thereon are not before this Court.

PROVISIONS INVOLVED

Both courts below based their decisions in part on Insurance Code Article 21.49, Vernon's Annotated Texas Statutes, but neither ruled upon its validity in relation to any provision in the Constitution of the United States.

REASONS FOR DENIAL OF WRIT

1. *There is no federal question involved.* The First Amended Original Petition filed by Petitioners as plaintiffs in the District Court of Travis County, Texas (Petition Appendix 6, p. 30), first asserts an administrative appeal under Article 6252-13a, Vernon's Annotated Texas Statutes (p. 31), and only alternatively alleges violation of the Fourteenth Amendment to the United

States Constitution (p. 34). The constitutional issues were severed for separate trial (Appendix D hereto), and no holding thereon is in either decision below. The Fifth and Seventh Amendments to the United States Constitution were not even mentioned in Petitioners' trial court pleading.

Petitioners joined in the motion to sever (Appendix C hereto) and, therefore, consented for this cause to be tried on state grounds. In *Michigan v. Tyler,* 436 U.S. 490 (1978), this Court pointed out that (ftn. 7):

> "Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule."

2. *The judgment below rested on adequate and independent state grounds.* The applicable rule here is that which this Court stated in *Zacchini v. Scripps-Howard Broadcasting Company,* 433 U.S. 562 (1977), when it wrote (433 U.S. 566):

> "If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, Wilson v. Loew's Inc., 355 U.S. 597, 78 S.Ct. 526, 2 L.Ed.2d 519 (1958), for '[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."

3. *The concept of due process urged by Petitioners has been rejected by this Court.* In *Ferguson v. Skrupa,*

372 U.S. 728 (1963), this Court explained that (372 U.S. 729-730):

> "There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . . The doctrine . . .—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitutue their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' "

A later holding to the same effect in that opinion reads (372 U.S. 731-732):

> "We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer,

> Lord Keynes, or some other is no concern of ours. The Kansas . . . statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas."

Portions of those excerpts were quoted in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), where it was further held that (414 U.S. 167):

> "Those two opposed views of public policy are considerations for the legislative choice. The Liggett case was a creation at war with the earlier constitutional view of legislative power. Munn v. Illinois, 94 U.S. 113, 132, 134, 24 L.Ed. 77, and opposed to our more recent decisions. Olsen v. Nebraska ex rel. Western Ref. & Bond Ass'n, 313 U.S. 236, 241, 61 S.Ct. 862, 85 L.Ed. 1305; Williamson v. Lee Optical Co., 348 U.S. 483, 487-488, 75 S.Ct. 461, 464, 99 L.Ed. 563; Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 72 S.Ct. 405, 96 L.Ed. 469, as well as the Daniel, Lincoln Union, and Ferguson cases already discussed. The Liggett case, being a derelict in the stream of the law, is hereby overruled."

4. *The decisions below are in accord with this Court's express holdings on the right to trial by jury.* The Texas courts have held that the administrative appeal here should be and properly was tried under the substantial evidence rule and that no jury was authorized. Petitioners urge that the Fourteenth Amendment should be expanded to include the right to trial by jury on their appeal of the administrative decision. A comparable contention was advanced in *Atlas Roofing Co. v. Occupational Safety &*

Health Review Commission, 430 U.S. 442 (1977), where it was noted that (430 U.S. 450):

> "Petitioners then claim that to permit Congress to assign the function of adjudicating the Government's rights to civil penalties for violation of the statute to a different forum—an administrative agency in which no jury is available—would be to permit Congress to deprive a defendant of his Seventh Amendment jury right. We disagree. At least in cases in which 'public rights' are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible."

A later holding clearly in point and clearly contrary to Petitioners' contention reads (430 U.S. 460):

> "The point is that the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases. It took the existing legal order as it found it, and there is little or no basis for concluding that the Amendment should now be interpreted to provide an impenetrable barrier to administrative factfinding under otherwise valid federal regulatory statutes."

CONCLUSION

Petitioners have not fulfilled the general requirements for this Court's jurisdiction and have presented no issue meritorious of this Court's ruling.

PRAYER

WHEREFORE, PREMISES CONSIDERED, this Respondent Texas Catastrophe Property Insurance Association prays that writ of certiorari be denied.

Respectfully submitted,

MARY JOE CARROLL
P. O. Box 1148
Austin, Texas 78767
(512) 472-8442

Attorney for Respondent
Texas Catastrophe Property
Insurance Association

Of Counsel:

CLARK, THOMAS, WINTERS & SHAPIRO
P. O. Box 1148
Austin, Texas 78767

PROOF OF SERVICE

I, Mary Joe Carroll, Attorney for Texas Catastrophe Property Insurance Association, a Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of June, 1980, I served copies of the foregoing Brief in Opposition to Petition for Certiorari on the parties hereto, said copies having been mailed to Mr. Joe E. Shaddock, 318 City National Building, Wichita Falls, Texas 76301, Attorney for Petitioners, and to Ms. Catherine Brown Fryer, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, Attorney for Co-Respondent Texas State Board of Insurance.

MARY JOE CARROLL

APPENDIX A

NO. 260,154

IN THE 53RD DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

BEACON NATIONAL INSURANCE COMPANY
AND FIRST PREFERRED INSURANCE COMPANY

v.

TEXAS STATE BOARD OF INSURANCE AND
TEXAS CATASTROPHE PROPERTY
INSURANCE ASSOCIATION

ORDER

Came on to be heard on the 18th day of August, 1977, the motion of the Texas Catastrophe Property Insurance Association for a determination of scope of review and Plaintiff's motion for production of documents. After argument of counsel, the Court enters the following order:

It is ordered, adjudged, and decreed that the scope of review of the order of the State Board of Insurance shall be substantial evidence and not trial de novo; it is further ordered, adjudged, and decreed that Texas Catastrophe Property Insurance Association's motion for protective order be and is hereby granted.

Signed and ordered this 1st day of September, 1977.

/s/ Charles D. Mathews
Charles D. Mathews

APPENDIX B

NO. 260,154

IN THE 53RD DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

BEACON NATIONAL INSURANCE
COMPANY, ET AL

v.

STATE BOARD OF INSURANCE, ET AL

PRE TRIAL ORDER

On this 3rd day of March, 1978 came on to be heard the Motion of Defendant Texas Catastrophe Property Insurance Association to strike the above case from its jury setting and all parties having appeared by their respective attorneys and announced ready the court proceeded to hear such motion and to determine the manner in which this case is to be tried:

It appearing to the court that there are separate and divisible causes of action alleged in the Petition of Plaintiffs and that the portion dealing with the administrative appeal should be tried first and separately from the other causes of action, it is therefore ordered:

1.) The administrative appeal will be determined first and separately from the remainder of the case.

2.) The administrative appeal will be determined by the Court by a review of the record before the State Board of Insurance under the Substantial Evidence Rule and no additional evidence will

be accepted in this phase of the case. Plaintiffs will submit written briefs and defendants will have 21 days after receipt of Plaintiff's brief to file their reply briefs. The Court will then determine this phase of the case and advise all parties of his proposed ruling.

3.) All instruments concerning the administrative appeal portion of the case will be so denominated and all exhibits for this phase of the case will be referred to as I - 1., I - 2, etc.

4.) Upon the determination of the administrative appeal phase of the case the court will then proceed, if necessary, to hear the constitutional law question and injunction without the intervention of a jury. Additional evidence will be accepted for this phase of the case only.

5.) All instruments concerning the constitutional law and injunction phase of this case will be so denominated and all exhibits for this phase of the case will be referred to as II - 1., II - 2, etc.

/s/ HARLEY CLARK
Judge Presiding

APPENDIX C

NO. 260,154

IN THE 53RD DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

BEACON NATIONAL INSURANCE COMPANY
AND FIRST PREFERRED INSURANCE COMPANY

v.

TEXAS STATE BOARD OF INSURANCE AND
TEXAS CATASTROPHE PROPERTY
INSURANCE ASSOCIATION

MOTION FOR SEVERANCE

NOW COMES Beacon National Insurance Company and First Preferred Insurance Company, Plaintiffs herein and present to the Court this their Motion for Severance of their appeal from the Texas Catastrophe Pool Insurance Association and State Board of Insurance orders from their cause of action alleging the unconstitutionality of the operation of the Texas Catastrophe Property Insurance Association and for injunction and for grounds would show to the Court that these questions involve separate questions of law, that the Appeal (Phase I) has been ruled to be tried on the Substantial Evidence Rule while the remainder of the causes of action (Phase II) will be tried on new evidence in a non-jury trial. Further Defendants have moved for severance and Plaintiffs now join Defendants in their Motions for Severance in the manner indicated above.

WHEREFORE, premises considered, Plaintiffs pray for Severance as above.

Respectfully submitted,

Joe E. Shaddock
318 City National Building
Wichita Falls, Texas 76307

APPENDIX D

NO. 260,154

IN THE 53RD DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

BEACON NATIONAL INSURANCE COMPANY
AND FIRST PREFERRED INSURANCE COMPANY

v.

TEXAS STATE BOARD OF INSURANCE AND
TEXAS CATASTROPHE PROPERTY
INSURANCE ASSOCIATION

ORDER OF SEVERANCE

ON THIS 23rd day of August, 1978, came on to be heard the Motion of Severance hertofore filed herein by Defendants and it appearing to the Court that severance is necessary in order to expedite administration of this case:

IT IS THEREFORE ORDERED that Phase I of this suit concerning the administrative appeal of Plaintiffs Beacon National Insurance Company and First Preferred Insurance Company against Defendants Texas State Board of Insurance and Texas Catastrophe Property Property Insurance Association be severed from Phase II concerning the constitutional question and injunctive relief raised by Plaintiffs, and it is further ordered that the District Clerk shall make copies of all pleadings and file the same under a separate docket number so that Phase II may be administered henceforth as a separate lawsuit.

ENTERED this 19th day of Sept., 1978.

/s/ HARLEY CLARK
Judge Presiding